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CARRIERS—CONSTITUTIONAL LAW—REASONABLE RATES.

The recent rate laws have been productive of much trouble between the State and United States authorities. In both Missouri and North Carolina, open conflict seems to have been averted only by concessions on the part of the railroads. Domestic tranquility already has been shaken because both state and federal powers are endeavoring to control certain of the functions of these great arteries of commerce. Two decisions, particularly, which have been the subject of widespread interest and discussion throughout the Union, are *Southern Ry. Co. v. M'Neil,* 155 Fed. 756 (N. C.), and *Seaboard Air Line Ry. Co. v. Railroad Commission,* 155 Fed. 792 (Ala.).

It is a well settled rule that a State, unless (a) forbidden by its own Constitution, or (b) estopped by its dealings with a corporation, or unless (c) vested rights have been created in such corporation, may at any time, and for any cause, exercise its sovereign, political prerogative of preventing at its own pleasure (as distinguished from its legal right to expel for cause) any foreign corporation from doing a domestic business within its borders. *Doyle v. Continental Ins. Co.,* 94 U. S. 535; *Life Ins. Co. v. Prewitt,* 202 U. S. 246.

This question arose in the Railroad Commission Case, where Judge Jones held unconstitutional a recent statute of Alabama which provided that the bringing of a suit by a foreign corporation in the federal court "shall *ipso facto* forfeit all its right or license to engage in or carry on business, originating and terminating in this State, of freight or passengers, and its right or license to engage in or carry on such business in this State shall by said act itself be revoked and shall cease." This statute, Judge Jones said, contravened both the federal and State Constitutions. Section 240 of the Constitu-

tion of Alabama gives the right to foreign corporations "to sue in all courts, in like cases as natural persons." This section prevents the State legislature from hampering the right to resort to the federal courts, as had been done in some States. It is an assurance to all that Alabama would not depart from its traditional policy and expel foreign corporations if they chose to exercise the same rights as natural persons to resort to the federal courts. Such a law which declares that a corporation is *ipso facto* expelled, because it resorts to a federal court, is *ipso facto* a defiance of the Federal Constitution, for it is an attempt to expel the corporation for doing something which the Constitution gives it an express right to do. *Insurance Co. v. Morse,* 20 Wall. 445; *Barron v. Burnside,* 121 U. S. 186.

Again, this statute violated the obligations of contract, and deprived the corporation of vested rights. The Legislature, in view of the need of more railroads and the betterment of existing systems, had induced foreign corporations to aid in the development of the State. On the faith of these proposals such corporations entered Alabama, spent millions of dollars in the purchase and lease of railroads, arranged their business accordingly, and acquired rights thereby which the State cannot now arbitrarily forfeit.

The next interesting question arose as to the propriety of granting a preliminary injunction. "There may be situations," Judge Jones says in the Alabama decision, "where the result of the operation of reduced rates, whether beneficial or otherwise, cannot well be ascertained, except by their actual operation, in which event courts may order such test." This was the rule applied in Missouri in the recent case of *St. Louis, etc., R. Co. v. Hadley,* 155 Fed. 220. But in the cases under discussion both Judge Pritchard and Judge Jones held that if not enjoined the proposed rates might cause such great and irreparable injury as to deprive the complainants of a right guaranteed by the Federal Constitution. When, therefore, the facts shown by the complainant, taken in connection with the opposing evidence, present a reasonable probability that the rates may be adjudged invalid on final hearing, the court will balance the relative harm which may befall the adverse interests from the issue of the writ, and grant or withhold the writ accordingly. This desire of the federal courts to preserve the *statu quo* where it appears that the complainant is likely to suffer irreparable harm is so strong that even when the judge considers the act constitutional, and dismisses the bill, he may grant an order restraining the enforcement of the act until the matter can be determined by the Supreme Court. *Cotting v. Kan. Stockyards Co.,* 183 U. S. 79; *Hovey v. McDonald,* 109 U. S. 150, 161.

As to rates prescribed for transportation of persons and property carried only within the limits of the State, their reasonableness, says Judge Jones, must be based upon the value of the property devoted to interstate commerce, and neither the profits nor the losses in the one business can be estimated in determining the reasonableness of the rates as to the other.

The rule that rates must be reasonable has always been recognized. But the difficulty lies in framing a standard of reasonable-

ness. Charges for transportation are based on ability to pay; they are similar to taxes. And state regulation of rates is no new thing. The real source of authority for state regulation is rather the fact that property has been clothed with a public interest than the *quasi* public character of the railroad corporation. *Munn v. Illinois,* 94 U. S. 113. But while the legislature may make a rate, the courts alone may determine its reasonableness. *Maximum Rate Case,* 167 U. S. 499; *Steenerson v. Gt. N. R. Co.,* 69 Minn. 353. State action is, however, necessarily limited by the fact that its power extends to *intrastate* commerce only; and when a State has acted, either by itself, or through a commission (as was the case in North Carolina and Alabama), there arises the further question whether its action violates the Fourteenth Amendment This is purely a judicial question. The inquiry of the courts is whether the rates prescribed are so unreasonable that their enforcement will deprive the railroad of a fair return upon its property—whether they are confiscatory. It must clearly be understood that the courts cannot substitute their judgment of a reasonable rate for that of the State: they cannot question its expediency or propriety. That is mere administrative work. The word "unreasonable," therefore, is equivalent to confiscatory. The question is not whether the rate is unreasonable as such, but so unreasonable as to amount to a taking of property. *Reagan v. Farmers' L. & T. Co.,* 154 U. S. 362; *Minneapolis, etc., R. Co. v. Minnesota,* 186 U. S. 268.

While, therefore, the States have the power to fix rates, their determination cannot be deemed conclusive. The assumption of power by the Supreme Court to review the reasonableness of rates has been growing gradually for more than a quarter of a century. (a) In 1876, in the Granger cases, the court declined to review the reasonableness of rates fixed by States, holding this to be purely a legislative question. In other words, the States had the power to fix rates which should be conclusive. *Munn v. Illinois, supra; Chicago, etc., Ry. Co. v. Iowa,* 94 U. S. 155. This doctrine was reaffirmed in *Ruggles v. Illinois,* 108 U. S. 526. (b) But after some adverse *dicta,* this holding was, in 1889, modified in *Chicago, etc., Ry. Co. v. Minnesota,* 134 U. S. 418. Here the court decided to review the extent of rate regulation and held that legislative rates must afford some, though it might be only a slight, income above operating expenses. *Covington v. Sandford,* 164 U. S. 578. (c) Then in 1898, in *Smyth v. Ames,* 169 U. S. 466, the rule was laid down that the basis of calculations as to reasonable rates "must be the fair value of the property being used by it for the convenience of the public." This case is different from those preceding it in that the decision of the court was based on evidence taken at the trial as to investments and earnings of the railways involved, instead of on allegations or admission of parties to the suit. (d) And finally, in *Cotting v. Kansas City Stockyards Co., ubi supra,* the court says, "The question is not how much he makes out of his volume of business, but whether, in each particular transaction, the charge is an unreasonable exaction for the services rendered. . . . He has a right to charge for each separate service that which is a

reasonable compensation therefor, and the legislature may not deny him such reasonable compensation, and may not interfere simply because out of the multitude of his transactions the amount of his profits is large." In this case a net income of 10.9 per cent would have been reduced by the law to 5.3 per cent. This case seems to mark the complete transfer of power to determine what are reasonable rates for public service from the state legislatures to the courts.

A final important question in the principal cases was whether these were suits against the State within the Eleventh Amendment. In regard to this point there has been a gradual change of opinion. (a) *Osborn v. Bank,* 9 Wheat. 738, held that the fact that a State has an interest in the controversy, however extensive, will not bring the case under the Amendment and exclude the federal jurisdiction so long as the State itself is not a party. *Davis v. Gray,* 16 Wall. 203. (b) But this early rule was in effect overruled in *Poindexter v. Greenhow,* 114 U. S. 270. See also *in re Ayres,* 123 U. S. 443, where the court said that "the question whether a suit is within the prohibition of the Eleventh Amendment is not always to be determined by reference to the nominal parties on the record." Then in *Fitts v. McGhee,* 172 U. S. 516, it was said, "as a State can act only by its officers, an order restraining those officers from taking any steps, by means of judicial proceedings, in execution of a statute, is one which restrains the State itself, and the suit is consequently as much against the State as if the State were named as a party defendant on the record." *Minnesota v. Hitchcock,* 185 U. S. 373, 386; *Oregon v. Hitchcock,* 202 U. S. 60. Since this is the law, the question then is, When is the State the real party? Where an action is brought against a state officer in charge of property claimed by a *prima facie* valid title to be the property of the State, it is in effect a suit against the State. *In re Ayres, supra; Belknap v. Schild,* 161 U. S. 10. So a State may waive its privilege. *Clark v. Barnard,* 108 U. S. 436. Or it may consent to be sued in its own courts only. *Smith v. Reeves,* 178 U. S. 436. But the State's interest must be one in the State as an artificial person, as distinguished from that of a governmental interest in the welfare of its citizens in compelling obedience to the legal orders of its officials for the benefit of the public at large. *Poindexter v. Greenhow,* 114 U. S. 270, 290; *Missouri, etc., Ry. Co. v. Missouri Commissioners,* 183 U. S. 53. So where (a) the suit is against officers of the State, as representing the State's action and liability, thus making it the real party against which judgment will operate, it is within the Amendment. *Fitts v. McGhee, supra;* but where (b) the suit is against defendants, who, claiming to act as officers of the State, and under color of an unconstitutional statute, commit acts or wrong and injury to the rights and property of the plaintiff, acquired under a contract with the State, such suit is not an action against the State. *Reagan v. Farmers' L. & T. Co., ubi supra; Smyth v. Ames, ubi supa.* The principal cases were held to belong in this second class, and are to be distinguished from *Fitts v. McGhee,* which was a suit against the attorney-general of Alabama, where no state officer was charged with the performance of any duty in connection with the enforcement of the act.

For these and other reasons the two cases under discussion are valuable and interesting, dealing as they do with questions of great moment.

ENACTMENT OF STATUTES—GOVERNOR'S APPROVAL.

A novel state of facts came before the Supreme Court of Arkansas in the case of *Powell v. Hayes,* 104 S. W. 177. The governor of the State being ill and absent, the president of the Senate, Hon. John I. Moore, became acting governor. A bill which had passed the legislature came before him for consideration. He signed it one hour before Hon. X. O. Pindall succeeded him as president of the Senate and acting governor. Although Gov. Moore directed the bill to be taken to the office of the Secretary of State, the bill never left the governor's office where it was found on the following day by Gov. Pindall. He erased the approval of his predecessor and sent the bill with a veto message to the Secretary of State as required by law, where the act of disapproval was put on record. The court held, although there was strong dissent, that when the bill was signed by Gov. Moore, it thereupon became a law and that the governor's approval could not thereafter be withdrawn by veto.

It was considered an immaterial fact that the approval and the withdrawal of approval were the acts of different individuals, and that if Gov. Moore had the power to withdraw his approval, then Gov. Pindall had the same right. In the eyes of the law, they were but one person, the governor of the State. Therefore, the one element of contention was as to the power of a governor to withdraw his approval of a bill.

Cooley, in his *Constitutional Limitations,* p. 154, states the rule as follows: "The governor's approval is not complete until the bill has passed beyond his control, by the constitutional and customary mode of legislation; and at any time prior to that he may reconsider and retract any approval previously made." But in the case under consideration the court repudiated this idea and stated that approval could not be withdrawn after the signing, regardless of the fact that the governor still retained the actual physical control of the bill. In support of its position the court relies on three decisions of the United States Supreme Court; *Marbury v. Madison,* 1 Cranch. 49; *Gardner v. Barney,* 6 Wall. 499; *Seven Hickory v. Ellery,* 103 U. S. 423.

Marbury v. Madison is distinguishable from the case under discussion in that President Adams had filed the commission sought to be withdrawn with the Secretary of State. It had thus passed entirely beyond his control. None of the courts go so far as to say that in such a case could he have withdrawn his approval. *State v. Whisner,* 35 Kan. 271. In the case under consideration, the bill never left the control of the governor. However, in *Marbury v. Madison,* Chief Justice Marshall freely expresses his views on the subject. He says, "The last act to be done by the president is the signature of the commission. The time for deliberation has passed. He has decided."

In *Gardner v. Barney* and *Seven Hickory v. Ellery, supra,* there are also statements which support the view of the Arkansas court.